Nos. 79-1711; 79-1754; 79-1760; 80-12 (Consolidated)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MIDDLESEX COUNTY SEWERAGE AUTHORITY, *et al.*,
Petitioners (79-1711)

v.

NATIONAL SEA CLAMMERS ASSOCIATION, *et al.*

JOINT MEETING OF ESSEX AND UNION COUNTIES,
Petitioner (79-1754)

v.

NATIONAL SEA CLAMMERS ASSOCIATION, *et al.*

CITY OF NEW YORK AND ABRAHAM BEAME,
Petitioners (79-1760)

v.

NATIONAL SEA CLAMMERS ASSOCIATION, *et al.*

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Petitioners (80-12)

v.

NATIONAL SEA CLAMMERS ASSOCIATION, *et al.*

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONER, THE JOINT MEETING OF ESSEX AND UNION COUNTIES

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Questions Presented

1. Whether the Federal Water Pollution Control Act, 33 U.S.C. §1251 *et seq.*, and the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. §1401, *et seq.*, imply a private right of action independent of the rights explicitly created by the citizens suit provisions of those Acts, 33 U.S.C. §§1365(e) and 1415(g).

2. Whether a private citizen has standing to maintain a federal common law nuisance action for alleged damages sustained resulting from ocean pollution, as a general federal question under 28 U.S.C. §1331.

3. Whether any federal common law nuisance action for alleged damages sustained resulting from ocean pollution, if available to a private citizen, is not pre-empted by the present regulatory scheme governing ocean pollution established by the Federal Water Pollution Control trol Act and The Marine Protection, Research and Sanctuaries Act.

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BRIEF FOR PETITIONER, THE JOINT MEETING OF ESSEX AND UNION COUNTIES

Opinions and Judgments Below

The Opinion of the Court of Appeals for the Third Circuit, filed February 5, 1980, is reported at 616 F.2d 1222. The Opinion and Judgment of the Court of Appeals is reprinted in the Appendix to the Petition for Certiorari of Middlesex County Sewerage Authority, *et al* at pp. 1a and 38a, respectively; and in the Petition for Certiorari of Environmental Protection Agency, *et al* at pp. 1a and 32a, respectively.

The Opinion of the District Court for the District of New Jersey is unreported officially but appears at 12 E.R.C. 1118. The Opinion and Order of the District Court is reprinted in the Appendix for Certiorari of Middlesex County Sewerage Authority, *et al* at pp. 40a and 60a respectively; and in the Appendix to the Petition for Certiorari of Environmental Protection Agency, *et al* at pp. 35a and 60a, respectively.

Jurisdiction

This Court has jurisdiction to review the Judgment of the Court of Appeals for the Third Circuit by Writ of Certiorari under 28 U.S.C. §1254(1). The Judgment of the Court of Appeals was entered on February 5, 1980. The Petition for a Writ of Certiorari by this Petitioner was filed on May 5, 1980, and was granted by this Court on October 20, 1980.

Constitutional and Statutory Provisions Involved

The pertinent provisions of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §1251 *et seq.* and

The Marine Protection, Research and Sanctuaries Act (MPRSA), 33 U.S.C. §1401 *et seq.*, involved in this case are reprinted in the Appendix of Middlesex County Sewerage Authority, *et al* at pp. 72a to 105a.

Statement of the Case

On January 14, 1977, plaintiffs, National Sea Clammers Association and Gosta Lovgren, on their own behalf and on behalf of a class of others allegedly similarly situated, commenced the instant action seeking both injunctive relief and damages against numerous Federal, New York and New Jersey State officials and agencies concerned either with the disposition of sewage or the administrative regulation of the activities of such agencies. Petitioner herein, the Joint Meeting of Essex and Union Counties (Joint Meeting), is an assembly of the members of the various municipalities comprising the Counties of Essex and Union, in the State of New Jersey, formed pursuant to N.J.S.A. 40:63-68, *et seq.*

The essence of plaintiffs' eleven count Complaint (Joint app. 18a, *et seq.*) is that the discharge of sewage and the dumping of sludge resulting from sewage treatment by the municipal defendants had caused damage to the clam, oyster and lobster beds in the Atlantic Ocean, thereby adversely affecting plaintiffs' commercial business of fishing, clamming and lobstering on the shores or in the waters of the ocean. The Complaint alleges that the defendants have caused damage to said beds by failing to carry out a series of statutory and constitutional duties designed to maintain pollution within certain respectable limits. Plaintiffs further contend that, since they are members of the class and purport to represent a class comprised of commercial fishermen engaged in the harvest

of clams, oysters, lobsters and fish in the Atlantic Ocean, they have the requisite standing to bring such an action.

The basic characterizations in law of the pertinent allegations made by plaintiffs in their Complaint against the Petitioner are essentially that Petitioner created and maintained a federal public nuisance resulting from the discharge of effluent and the dumping of sludge into New York Harbor and the Atlantic Ocean and that the Petitioner operated outside the scope of permits issued by various governmental authorities in direct violation of the FWPCA and MPRSA, thereby allowing the plaintiffs to commence a citizens' suit.

Petitioner and other defendants moved to dismiss the plaintiffs' claim for lack of subject matter jurisdiction in light of the fact that plaintiffs failed to provide a notice of their claims to the defendants as required by the FWPCA and MPRSA. Petitioner and the other defendants also urged that the plaintiffs, as private citizens, lacked the requisite standing to institute that part of the instant action based upon the federal common law of nuisance. The disposition of the issues presented on defendants' Motion to Dismiss by the Court below was as follows.

Regarding the claims asserted under the FWPCA and MPRSA, the District Court held that they must be dismissed because of plaintiffs' failure to timely serve notice on the defendants prior to institution of the action, as required by the respective statutes (pet. cert. app. 56a). While agreeing that strict adherence to the statutory notice provisions was required, the Court of Appeals reversed the holding of the District Court. In relying upon the "savings clauses" contained in the citizens' suit provisions of the Acts, the Court of Appeals held

that the absence of notice was not fatal because the "savings clauses" preserved any existing right of action under statute or common law. (Joint App. 10a).

Regarding plaintiffs' contention that they could maintain the instant litigation independent of any right pursuant to the "savings clauses" of the FWPCA and MPRSA as a right implied under those statutes and under the theory of federal common law of nuisance, the District Court held, relying primarily on *Illinois* v. *City of Milwaukee,* 406 U.S. 91 (1972), that the latter avenue of relief was available only in favor of states, not to private parties, and that the notice provisions of the statutes remained applicable to any actions brought pursuant to the "savings clauses" (pet. cert. app. 47a). The Court of Appeals reversed these determinations holding that a private federal common law nuisance claim was available through private citizens as well as an implied claim under the FWPCA and MPRSA (pet. cert. app. 28a-29a, 6a-14a).

Four Petitions for Certiorari were filed by a number of New Jersey Public Sewage Disposal Agencies, the City of New York and the Environmental Protection Agency. Said Petitions were granted by Order of this Court dated October 20, 1980, (Joint App. 48a). The questions were ordered limited to those set forth hereinabove.

Summary of Argument

1. Neither the FWPCA nor the MPRSA imply a private right of action independent of the rights explicitly created by the citizens' suit provisions contained therein. There is no dispute that the citizens' suit provisions of the FWPCA (which are analogous to the citi-

zens' suit provisions of MPRSA) were modeled after the citizens' suit provisions of the Clean Air Act, 42 U.S.C. §7604. There is dispute among the Circuits, however, as to whether the citizens' suit provisions of the FWPCA and MPRSA provide an exclusive jurisdictional basis for private actions to enforce the provisions of said Acts.

The more well-reasoned approach to a solution for this dilemma is contained in the holding in *City of Highland Park* v. *Train,* 519 F.2d 681 (7th Cir. 1975), which concluded that the savings clauses of the citizens' suit provisions of the Clean Air Act, which paralleled those of the FWPCA and MPRSA, provided the sole jurisdictional basis for private actions to enforce the provisions of the Act. Although the Court in *Highland Park, supra,* recognized the necessity of citizen participation in the enforcement of the provisions of the Act, it nevertheless pointed out the concern of Congress that such citizens' suits be made available in a such manner that already burdened federal courts would not become overburdened.

The legislative history embodied in the 1972 Senate Report on the FWPCA bill specifically notes that the savings clause provisions of the Act refer to any rights or remedies under "any other law" and not to the subject statute itself as concluded by the Court of Appeals below. The Court in *City of Evansville, Ind.* v. *Ky. Liquid Recycling,* 604 F.2d, 1008 (7th Cir. 1979), completely agreed with the interpretation contained in the Senate Report, thereby precluding the inference of any congressional intent to create a private right of action for damages under other provisions of the FWPCA. The Court in *City of Evansville, supra,* noted that §505, 33 U.S.C. §1365, was also applicable with respect to the third factor identified in *Cort* v. *Ash,* 422 U.S. 66, 78 (1975),

which required an evaluation of the legislative scheme vis-a-vis remedies sought. Upon examination of the legislative scheme, the Court concluded that the implication of a private right of action would be inconsistent with the congressional purposes of the act.

In line with Congress's intent to model the provisions of the FWPCA so as to be consistent with the holding of the Supreme Court in the case of *Sierra Club* v. *Morton,* 405 U.S. 727 (1972), the Court of Appeals below concluded that actions brought pursuant to §1365(a)(1) were to be in the nature of private attorney general actions instituted by non-injured citizens while those actions brought pursuant to §1365(e) were relegated to citizens who had been injured. However, a comparison of the statutory language of the Administrative Procedure Act, with which the Court in *Sierra Club, supra,* was concerned, and the language contained in §1365(g) of the FWPCA, clearly indicates that the only "citizens" who have standing to bring actions pursuant to those Acts must have an interest which is or may be adversely affected, thereby precluding private attorney general actions such as envisioned by the Court of Appeals below.

The Court of Appeals finally relied upon the four part test for finding an implied private cause of action established by the Supreme Court in *Cort* v. *Ash, supra.* In essence, said four part test boiled down to the ultimate determination as to whether congress intended to create the private remedy asserted. In conjunction with the undisputed purpose of the FWPCA to protect individuals from injury caused by the polluting activities of others and consistent with the conclusion that private attorney general actions are not allowable under the Act, the unmistaken conclusion results that the sole basis for relief for injured citizens is through the citizens suit provisions of the Acts.

2. A private citizen does not have standing to maintain a federal common law nuisance action for alleged damages sustained resulting from ocean pollution as a general federal question under 28 U.S.C. §1331.

In *Illinois* v. *City of Milwaukee,* 406 U.S. 91 (1972), the Supreme Court concluded that a cause of action in federal common law of nuisance for water pollution was available to the plaintiff therein. The Court of Appeals below extended the scope and effect of the decision in *Illinois, supra,* to allow such federal common law nuisance actions to be instituted by private citizens. In light of the fact that the Court in *Illinois, supra,* relied upon causes of action brought on behalf of states as legal precedent and decisions subsequent to *Illinois, supra,* have confined federal common law of nuisance actions to those brought on behalf of governmental plaintiffs, the conclusion of the Court of Appeals below is unfounded.

In the case of the *Committee for the Consideration of the Jones Falls Sewage System* v. *Train,* 375 F.Supp. 1148 (D.Md. 1977), aff'd on the other grounds, 539 F.2d 1006 (4th Cir. 1976), the District Court confirmed the existence of a body of federal common law of nuisance emanating from *Illinois, supra,* but specifically restricted said actions to those of plaintiffs seeking relief on behalf of states and the United States. Certainly, if the Supreme Court wished to extend the availability of federal common law nuisance actions beyond those instituted on behalf of governmental plaintiffs, then such an extension of scope would have been explicitly stated in its opinion.

Exception is also taken to the effect of the decision of the Court of Appeals below which allows private litigants to recover damages against the defendants herein. In line with the rationale of the District Court in *Parsell* v. *Shell Oil Company,* 421 F.Supp. 1275 (D.Conn. 1976),

aff'd without opinion sub nom., *East End Yacht Club, Inc.* v. *Shell Oil Company,* 573 F.2d at 1289 (2d Cir. 1977), it is inconceivable that even if the Court in *Illinois, supra,* envisioned actions based upon federal common law of nuisance by private litigants, those actions would be concerned with any relief other than the abatement of nuisances emanating from one state to another, and not for damages.

3. Any federal common law nuisance action by a private citizen for alleged damages sustained resulting from ocean pollution, if available, should be preempted by the present regulatory scheme governing ocean pollution established by the FWPCA and the MPRSA.

In *Illinois* v. *Milwaukee, supra,* the issue of federal statutory preemption of federal common law nuisance actions was first discussed. The Supreme Court concluded therein that federal statutory preemption did not exist at that time, but that new federal laws and new federal regulations may at some point in the future preempt the field of federal common law of nuisance. Subsequent decisions in the case of *United States* v. *Ira S. Bushey & Sons, Inc.,* 346 F.Supp. 145 (D.Vt. 1972) and *United States ex rel Scott* v. *United States Steel Corp.,* 356 F. Supp. 56 (D.Ill. 1973), also refused to accept federal statutory preemption of federal common law nuisance actions for water pollution, in line with *Illinois, supra,* but again with the proviso that such actions would be maintainable only until legislation had been passed effectively regulating and preventing the pollution of interstate waters. It is important to note that the nature of all the plaintiffs therein were governmental units and also that the effect of the 1972 and 1977 amendments of the FWPCA and the enactment of the MPRSA in 1972 had not really been felt at the time these decisions were rendered. It is respectfully submitted

that the regulatory nature and enforcement authority embodied in these Acts were precisely what the aforesaid decisions looked toward when leaving a door open for federal statutory preemption of federal common law nuisance actions in the future. Thus, the time is now at hand when federal common law nuisance actions are no longer necessary in light of the stringent water pollution restrictions now on the books and the widespread enforcement capability of the EPA established as a result thereof.

ARGUMENT

POINT I

Neither the FWPCA as amended, nor the MPRSA as amended, imply a private right of action independent of the rights explicitly created by the citizens' suit provisions contained therein, 33 U.S.C. §§1365(e) and 1415(g).

Contrary to the holding of the District Court below, the Court of Appeals held that the "savings clauses" of the FWPCA and MPRSA, 33 U.S.C. §§1365(e) and 1415(g)(5), respectively, imply a private cause of action against any person or governmental agency alleged to be in violation of an effluent standard or limitation under the Acts or an order by the EPA Administrator or State concerning such a standard. Using 33 U.S.C. §1365(e) as a model, the savings clauses of these acts essentially provide:

> "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)."

It was recognized by both Courts below that the Circuits have differing opinions as to whether the citizens' suit provisions of the FWPCA and MPRSA provide an exclusive jurisdictional basis for private actions to enforce the provisions of said Acts. The D.C. and Second Circuits have held that the citizens' suit provisions are not exclusive, thereby allowing jurisdiction to be predicated alternatively on 28 U.S.C. §1331 without the necessity of complying with the notice requirements attendant to the citizens' suit provisions. *Natural Resources Defense Council, Inc.* v. *Train,* 510 F.2d 692 (D.C. Cir. 1974), *Natural Resources Defense Counsel, Inc.* v. *Callaway,* 524 F.2d 79 (2d Cir. 1975). However, in *City of Highland Park* v. *Train,* 519 F. 2nd 681 (7th Cir. 1975), the Seventh Circuit held that the citizens' suit provisions of the Clean Air Act, which paralleled those of the FWPCA and MPRSA, provided the *sole* jurisdictional basis for private actions to enforce the provisions of the Act. The District Court also noted that a District of New Jersey case had followed the lead of the D.C. and Second Circuits on this issue. *Township of Long Beach* v. *City of New York,* 445 F. Supp. 1203 (D.N.J. 1978).

The District Court believed that the Seventh Circuits' analysis and holding in *Highland Park, supra,* represented the more well-reasoned approach to this dilemma and thereby concluded that the savings clauses of the citizens' suit provisions of the FWPCA and MPRSA may allow alternate basis for jurisdiction pursuant to 28 U.S.C. §1331, but not without compliance with the notice requirements thereof. However, the Court of Appeals considered the holdings in the D.C. and Second Circuits to be more persuasively reasoned than that of the Seventh Circuit and, therefore, held that such a separate and distinct jurisdictional basis in fact existed. (pet. cert. app. 10a). There is no indication in the opinion of the Court of Appeals as to why the D.C. and Second Circuit Opinions represented

"more persuasively reasoned cases" than that of the Seventh Circuit.

Based upon the agreement of the Court of Appeals below that the citizens' suit provisions of the FWPCA were modeled after the citizens' suit provisions of the Clean Air Act, 42 U.S.C. §7604 (pet. cert. app. 4a and 11a), it would seem inconsistent that the Court of Appeals would not follow the reasoning in *Highland Park, supra,* which specifically dealt with the relationship of the savings clause and citizens' suit provisions in the Clean Air Act. The Court in *Highland Park, supra,* pertinently noted that the legislative history of the Clean Air Act:

> "Shows Congress's determination that citizen participation in the enforcement of standards and regulations under the Clean Air Act of 1970 be established. It also shows, however, that Congress intended to provide for citizens' suits in a manner that would be least likely to clog already burdened federal courts and most likely to trigger governmental action which would alleviate any need for judicial relief. It was in response to these concerns that the statutory notice provisions were included in Section 304. Congress's intention would be frustrated if the statutory mandate of Section 304(d) were ignored." 519 F. 2d at 690-691.

The Court went on to conclude that the savings clause of the Clean Air Act

> "expressing the general intention of Congress not to disturb existing rights to seek relief does not have the affirmative effect of removing conditions which existing law imposes on the exercise of those rights." 519 F. 2d at 693.

A further review of the legislative history of the savings clauses of the FWPCA and MPRSA will serve to illustrate the obvious inconsistencies of the Court of Appeals holding. With respect to the savings clause, the 1972 Senate Report on the FWPCA bill pertinently stated:

> ". . . it should be noted, however, that the section would specifically preserve any rights or remedies under *any other law*". (emphasis added) S.Rep. No. 414, Reported in 1972, *U.S. Code Cong. & Adm. News,* 3668, 3746.

Substantially the same reasoning is contained in the Senate Report on the MPRSA bill. S.Rep. No. 1301, reported 1972, *U.S. Code Cong. & Admin. News,* 4232, 4250. The Court of Appeals below interpreted the reference to "any statute" in §1365(e) to include the subject statute itself contrary to the clear intent noted in the above cited Senate Report that "any statute" means any statute other than the FWPCA itself. Although the Court of Appeals alluded to the aforesaid legislatve history of the FWPCA, it concluded that it was not presuaded by the stated interpretation of the wording of the Act offered in the Senate Report. (pet. cert. app. 16a).

Interestingly enough, the Seventh Circuit has once again provided us with a very well-reasoned decision on point dealing specifically with the savings clause provision of the FWPCA. In *City of Evansville, Ind.* v. *Ky. Liquid Recycling,* 604 F. 2d 1008 (7th Cir. 1979), the Court prefaced its discussion by alluding to the legislative history cited above. The Court then addressed itself to the interpretation contained in the Senate Report of the statutory phrase "under any statute or common law" as "under any other law" as follows:

> "Even if this is intended only as a paraphrase, it suggests that a right of action for damages must

> be found outside the Act itself. And Congress' rejection of all but two of the proposed exceptions to the requirement of a 60-day waiting period for a citizens suit, *see* note 16, *supra,* reinforces the evidence in §505 [1365] itself of an intent to circumscribe private rights of action under the FWPCA." 604 F. 2d at 1015.

A footnote to the Court's conclusion hereinabove indicated that if the language in the Senate Report was intended to state exactly what was meant by the phrase "any statute or common law" rather than as a mere paraphrase, then §505(e), 33 U.S.C. §1365(e) would preclude the inference of any congressional intent to create a private right of action for damages under other provisions of the FWPCA. Nonetheless, the Court was not dissuaded from concluding as it did that private rights of action were precluded under the savings clause. The Court in *City of Evansville, supra,* noted further that §1365 was also applicable with respect to the third factor identified in *Cort* v. *Ash,* 422 U.S. 66, 78 (1975), namely, "is it inconsistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?" 604 F. 2d at 1015.

The legislative scheme of §1365 was aptly stated by the Court as follows:

> "§505 evidences a congressional intent to carefully channel public participation in the enforcement of the Act. Before commencing a citizen suit, the plaintiff must give notice not only to the alleged violator, but to the Administrator and the State in which the violation occurs. If either the Administrator or the State initiates adequate enforcement proceedings, the private action is foreclosed, although the complainant is authorized to intervene

'as of right'. §505(b), 33 U.S.C. §1365(b)." 604 F.2d at 1015.

The Court then concluded that a private plaintiff may enforce compliance with the effluent standards and limitations, require the Administrator to perform a duty to act, and impose civil penalties by instituting a private suit under §505(a), 33 U.S.C. §1365(a). However, the Court went on to emphasize that the implication of a private remedy "would be inconsistent with the congressional purpose implicit in the Act of encouraging private participation in the enforcement of the Act within the channels expressly provided". 604 F. 2d at 1016.

In further support of its contention that a general private cause of action exists under the FWPCA and MPRSA, the Court of Appeals below rationalized that actions brought pursuant to §1365(a)(1) were to be in the nature of private attorney general actions instituted by non-injured citizens while those actions brought pursuant to §1365(e) were relegated to citizens who had been injured. The basis for this thesis proposed by the Court of Appeals is Congress' attempt to insure that the FWPCA would comply with the holding of the Supreme Court in the then-recent case of *Sierra Club* v. *Morton,* 405 U.S. 727 (1972). (pet. cert. app. 7a).

In *Sierra Club, supra,* the Supreme Court concluded that an environmental group would have standing to bring suit pursuant to the Administrative Procedure Act if it could allege an adverse effect on its interest. The Court of Appeals thrust was that it was Congress's intent consistent with the *Sierra Club* decision to provide generally for citizens' suits which would not be subject to the jurisdictional amount requirement but which would still allow for private attorney general enforcement. A comparison

of the statutory language, however, would seem to imply a somewhat different result. Section 1365(g) defines a "citizen" who is permitted to institute an action under §1365(a) as a "person or persons having an interest which is or may be adversely affected". It is interesting to note that the Court in *Sierra Club, supra,* also required that the person or persons instituting the suit must be "adversely affected". 405 U.S. at 740.

It would appear intuitively obvious that standing in both sections is predicated upon injury. Thus, the citizens contemplated by both §§1365(a) and (e), must be one in the same. This being the case, the rationale employed by the Court of Appeals appears to be completely misplaced and unable to support its conclusion that there is a private right of action independent of §1365(a).

In furtherance of its position, the Court of Appeals then relied upon the four part test for finding an implied private cause of action established by the Supreme Court in *Cort* v. *Ash, supra.* The factors referred to in *Cort* are:

> First, is the plaintiff "one of the class for whose special benefit the statute was enacted," . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such remedy or to deny one? . . . Third, is it consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States so that it would be inappropriate to infer a cause of action based solely on federal law? 422 U.S. at 78.

The significance of the four part test established in *Cort* v. *Ash, supra,* was explained in *Touche Ross & Co.* v. *Redington,* 442 U.S. 560, 575 (1979) wherein the Court stated:

> ". . . the Court did not decide that each of these factors is entitled to equal weight. The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action."

Further enforcement of the *Touche Ross* refinement was given by the Supreme Court in *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. 11, 15-16 (1979) wherein the Court noted that the "question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction". Thus, the ultimate determination is whether Congress intended to create the private remedy asserted.

There can be no dispute that one of the primary purposes behind the passage of the FWPCA was the protection of individuals from injury caused by the polluting activities of others. Consistent with this purpose, those individuals suffering actual injury by the pollution should be given a means by which their injury could be judicially addressed. As previously noted, the Court of Appeals concluded that §1365(a) allowed for private attorney general actions to be instituted by non-injured citizens. Burdened by this conclusion in applying the factors established in *Cort* v. *Ash,* as furthered modified and explained in *Touche Ross, supra,* and *Transamerica Mortgage, supra,* the Court of Appeals below could only conclude that the only available means for the institution of judicial action by injured citizens was through the provisions of §1365(e), which would thus be consistent with the intent of Congress to

provide protection to those who are likely to be injured. The holding of the Court of Appeals that §1365(a) provided a private attorney general cause of action precluded any other conclusion.

Unburdened by the Court of Appeals' conclusion that a private attorney general right of action exists, the determination that a private remedy exists for citizens injured by violation of the act would also be consistent with the purposes of the act. However, under the latter thesis, the private right of action would exist pursuant to §1365(a) as further modified and explained in §1365(e). Thus, while both theses provide for a private remedy, the latter would only provide for one within the context of the FWPCA and MPRSA.

It is respectfully submitted that the legislative scheme intended and as enacted by Congress envisioned private remedies only for those citizens injured as a result of water pollution. Thus, a private right of action independent of the citizen's suit provisions does not exist.

POINT II

A private citizen lacks standing to maintain a federal common law nuisance action for alleged damages sustained resulting from ocean pollution as a general federal question under 28 U.S.C. §1331.

In reliance upon the holding of the Supreme Court in *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972) contrary to that of the District Court, the Court of Appeals below held that a cause of action in federal common law of nuisance for water pollution did extend to private citizen plaintiffs. It is respectfuly submitted that the Court of Appeals

below has extended the scope and effect of the decision of this Court in *Illinois* v. *Milwaukee, supra,* to a point far beyond that for which it was intended.

The principal issue for this Court in *Illinois* v. *Milwaukee, supra,* was "whether pollution of interstate or navigable waters creates an action arising under the 'laws' of the United States within the meaning of §1331(a)". 406 U.S. 91 at 99. In holding that such an action does arise pursuant to §1331(a), the Supreme Court pertinently stated:

> "As the field of federal common law has given necessary expansion to matters of federal concern and relationship (where no applicable federal statute exists, as there does not here), the ecological rights of a State in the improper impairment of them from sources outside the States own territory, now would and should be, we think, held to be a matter having basis and standard in federal common law and so directly constituting a question arising under the laws of the United States." 406 U.S. at 99-100

In so holding, the Court relied upon actions brought on behalf of states as legal precedent, thereby precluding a carte blanche basis for permitting such actions instituted by other then state plaintiffs.

Subsequent to the decision in *Illinois* v. *Milwaukee, supra,* the lower Federal Courts have consistently and almost without exception confined federal common law of nuisance actions to those brought on behalf of state plaintiffs and by the United States. See, e.g., *Committee for Con. of Jones Falls Sewage System* v. *Train,* 375 F. Supp. 1148 (D.Md. 1974), affirmed on other grounds consistent with that of the district court on the instant issue, 539 F.2d

1006 (4th Cir. 1976) en banc); *Parsell* v. *Shell Oil Co.*, 421 F. Supp. 1275 (D. Conn. 1976), aff'd without opinion *sub nom. East End Yacht Club, Inc.* v. *Shell Oil Co.*, 573 F.2d 1289 (2 Cir. 1977); *Stream Pollution Bd. of Ind.* v. *U.S. Steel Corp.*, 512 F. 2d 1036 (7th cir. 1975) (private citizen denied intervention); cf. *Highland Park* v. *Train, supra,* 519 F.2d 681); but see *Byram River* v. *Village of Portchester,* 394 F.Supp. 618 (S.D.N.Y. 1975); *United States* v. *Ira S. Bushey & Sons, Inc.,* 346 F. Supp. 145 (D. Vt. 1972) 363 F. Supp. 110 (D. Vt. 1973), aff'd 487 F.2d 1393 (2d Cir. 1973), cert. den., 417 U.S. 976, 94 S. Ct. 3182, 41 L.Ed. 2d 1146 (1976); *United States* v. *United States Steel Corp.,* 356 F. Supp. 556 (N.D. Ill. 1973); *United States* v. *Stoeco Homes, Inc.,* 489 F.2d 597 (3d Cir. 1974), *cert. den.* 420 U.S. 927, 95 S. Ct. 1124, 43 L.Ed. 2d 397 (1975).

In the case of *Committee for Con. of Jones Falls Sewage System* v. *Train, supra,* the District Court concluded that an individual citizen could not bring an action based upon the theory of federal common law of nuisance. The rationale applied by the District Court therein in reliance on *Illinois* v. *Milwaukee, supra,* was that a cause of action in federal common law of nuisance was found to exist in the latter case because of the "character of the plaintiffs as governmental units". 375 F. Supp. at 1153. In its affirmance, the Court of Appeals for the Fourth Circuit further solidified the development of a body of federal common law of nuisance eminating from *Illinois* v. *Milwaukee, supra,* and cases relied upon therein, while still maintaining the constraint that a cause of action brought under this theory was available only to those plaintiffs seeking relief on behalf of states, with one exception. The Court further noted:

> "Perhaps with the exception of actions by the United States to abate public nuisances created in navig-

> able waters by polluters, (citations omitted) but consistent with Section 1251(b)[FWPCA], the doctrine of *Illinois* v. *Milwaukee* has not been extended beyond the abatement of public nuisance in interstate controversies where the complainant is a state and the defenders are creating extra territorial harm." 539 F.2d at 1009.

In its holding, the Court of Appeals below relied heavily (pet. cert. app. 25a) upon Footnote 6 in *Illinois* v. *Milwaukee,* 406 U.S. at 105, which stated in pertinent part:

> "Thus it is not only the character of the parties that requires us to apply federal law . . . [W]here there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interest of federalism, we have fashioned federal common law."

In essence, the Court of Appeals construed the language of said footnote as allowing a non-sovereign to institute a federal common law of nuisance action if the subject federal question to be considered required federal uniformity. The contra-holding in *Committee for Con. of Jones Falls Sewage System* v. *Train, supra,* with respect to the same footnote, contains a more persuasively reasoned analysis of the intent of the Court in *Illinois* v. *Milwaukee.* The Court specifically noted therein:

> ". . . this statement [it is not only the character of the parties that requires us to apply federal law] can be read in at least two different ways. It could mean (a) that there were other considerations sufficient in themselves to require application of federal law, or (b) that there were other federal interests which in addition to the character of the

> parties required the application of federal law although those other interests in themselves would not have been sufficient. In the view this Court takes of the basis for the Supreme Court's decision, the latter interpretation is the proper one. 375 F. Supp. at 1154, n.12.

It is obvious almost without question that the foregoing analysis should be relied upon by this Court as the only basis for its decision regarding a private citizens' standing to maintain a federal common-law nuisance action. If the Supreme Court in *Illinois* envisioned that such actions should be available to private citizens, there is no reason that the opinion would not, or could not, have so explicitly stated same. However, by specifically constraining its decision to the class of plaintiffs therein, the Supreme Court let it be known that its determination regarding the availability of federal common law nuisance actions should not be extended beyond the context in which it was stated, as was so aptly construed in *Committee for Con. of Jones Falls Sewage System* v. *Train, supra.*

Exception is not only taken to the decision of the Court of Appeals below to extend the doctrine of *Illinois* v. *Milwaukee, supra,* to private citizen plaintiffs, but also to the effect of the Court of Appeals decision which would allow private litigants to recover damages against the defendants herein. It is respectfully submitted that even if the Court in *Illinois* v. *Milwaukee, supra,* envisioned actions based upon federal common law of nuisance by private litigants, those actions would only be concerned with abatement of nuisances eminating from one state into another, and not for damages.

The pure and simple reasoning forming the basis of this exception was very aptly and succinctly stated by the District Court in *Parsell* v. *Shell Oil Co., supra,* as follows:

> "Finally, there is justification for limiting any right of action under *Illinois* v. *Milwaukee* to private parties seeking injunctive relief rather than damages. Part of the reason why the Supreme Court encouraged the development of the federal common law of water pollution in *Milwaukee* was the need for resolution of intricate and highly important questions of the appropriate water quality standards to apply. As the Court said, 'these will be equity suits in which the informed judgment of the chancellor will largely govern.' 406 U.S. at 107-108, 92 S. Ct. at 1395. A jury awarding damages in an oil spill case with wholly intrastate impact would be contributing to the development of evolving water quality standards only in the most *ad hoc* way." 421 F.Supp. at 1281-1282.

It is respectfully submitted that the rationale of the District Court in *Parsell* v. *Shell Oil Co., supra,* is completely correct and equally as appropriate in the instant case. Damage suits were not contemplated in *Illinois,* nor is there any reason for them to be contemplated now.

POINT III

The present regulatory scheme governing ocean pollution established by the FWPCA and the MPRSA should preempt any federal common law nuisance action by a private citizen, if available, for alleged damages sustained resulting from ocean pollution.

The issue of federal statutory preemption of federal common law nuisance actions was first discussed by this Court in *Illinois* v. *Milwaukee, supra.* Therein, the Court noted that:

> "It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of public nuisance by water pollution." 406 U.S. at 107.

In reliance upon the Supreme Court's observation regarding preemption in *Illinois* v. *Milwaukee, supra,* the Court in *United States* v. *Ira S. Bushey & Sons, Inc., supra,* in denying a motion to dismiss the complaint, held, *inter alia,* that the numerous laws which Congress enacted to prohibit or control pollution of interstate or navigable waters did not establish in themselves the exclusive means by which federal policy and interest concerning the quality of water under federal jurisdiction might be protected in federal courts. In reference to *Illinois* v. *Milwaukee, supra,* the Court noted that it was made clear therein that the application of federal common law to abate a public nuisance in interstate and navigable waters was not inconsistent with the Water Pollution Control Act, the River and Harbors Act of 1899, or any other legislation yet enacted, thereby precluding the Court from accepting an argument that the existing federal statute preempted a federal common law of nuisance action.

In *United States ex rel Scott* v. *United States Steel Corp.,* 356 F. Supp. 56 (D.Ill. 1973), it was held that an Amendment to the Federal Water Pollution Control Act (33 U.S.C. §1151 et seq.), giving the Environmental Protection Agency the power to adopt and enforce regulations governing the pollution of interstate waters, did not preclude federal court jurisdiction of common law nuisance suits involving interstate waters. In that case, the United States and the State of Illinois filed a complaint which,

inter alia, claimed a federal common law right of action in nuisance to abate an alleged pollution of Lake Michigan, an interstate body of water. The Court concluded that it did not find any provision in the amendment, which became effective 12 days after the filing of the action, purporting to abolish the federal common law of nuisance, but rather it found an intention to supplement and amplify any pre-existing remedies. It was hornbook law, the Court pointed out, that statutes will not be construed in derogation of common law unless such intent is clear. The Court ultimately concluded that the plaintiff governments were free to maintain such an action at least until the Environmental Protection Agency had acted effectively in the area of regulating the pollution of interstate waters.

It is important to note that these three cases were commenced prior to the enactment of the MPRSA in 1972 and the 1977 amendments of the FWPCA and also prior to the time when the practical effects of the 1972 amendments of the FWPCA could be felt. Also, since the plaintiffs in these three cases were two states and the United States Government, the Courts' holdings that preemption did not exist at that time should only be construed as favorable to plaintiff governments.

The aforesaid holdings that federal common law nuisance actions involving water pollution were not preempted by then existing federal laws or regulations in that area did not in any way present an absolute bar to federal preemption in the future. Rather, these holdings looked toward a time when federal laws and regulations would have established a firm and effective network for the regulation and prevention of pollution of interstate waters under the auspices of the Environmental Protection Agency. It is respectfully submitted that the statutory and practical effect of the FWPCA 1972 and 1977 amendments and the

enactment of the MPRSA in 1974 is that the expectations envisioned in the aforesaid holdings have now been realized.

Thus, the more firmly established and comprehensive laws and regulations with respect to the prevention of water pollution now on the books accompanied by an effective enforcement arm in the EPA have precluded the necessity for federal common law nuisance actions by private citizens at this time. A cursory review of the changes and enhancements to federal water pollution control legislation as it has evolved since 1972 clearly supports the contention that statutory preemption of common law nuisance actions regarding water pollution should be the norm, rather than the exception.

Prior to 1972, the extent of federal water pollution control was embodied in 33 U.S.C. (1970 ed.) §1151 *et seq.* and Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. §407. The essential thrust of this water pollution legislation was the setting of ambient water quality standards to establish permissible levels of pollution in interstate waters, with the states being given primary responsibility for developing said standards along with the implementation and enforcement thereof. 33 U.S.C. (1970 ed.) §1160(c). The EPA did have the right to promulgate its own water quality standards should a state either fail to establish a water quality standard or to promulgate an inadequate one. 33 U.S.C. (1970 ed.) §1160(c).

By the promulgation of the 1972 and 1977 amendments to the FWPCA, the standards for elimination of water pollution were changed, the regulatory and enforcement process and procedures were more specifically defined and tightened, and the role of the EPA therein was greatly enhanced.

The specific statutory amendments are too numerous to set forth herein and their significance relative to the prior

enactments would have to be emphasized in great detail. Suffice it to say, however, that judicial notice will clearly reveal that the overall scope and effect of the 1972 and 1977 FWPCA amendments far overshadow the legislative scheme in effect prior thereto.

Of more significant impact to the case at hand was the enactment of the MPRSA in 1972. The primary concern of the MPRSA is the overall regulation of the dumping of materials into ocean waters and the strict limitation of the dumping of any materials which would "adversely affect human health, welfare or amenities, or the marine environment, ecological systems, or economic potentialities." 33 U.S.C. §1401(b).

In order to affectuate the aforesaid policy, a dumping permit program was established whereby the EPA would be authorized to issue permits for dumping material into ocean waters where the Administrator determined "that such dumping will not unreasonably degrade or endanger human health, welfare, or amenities or the marine environment, ecological systems or economic potentialities." 33 U.S.C. §1412. Various criteria were established by which the Administrator was to make this determination, 33 U.S.C. §1412(a) and authorization was given to the Administrator to designate the site and time for dumping. 33 U.S.C. §1412(c). Pursuant to 33 U.S.C. §1412a, enacted in 1977, the Administrator of the EPA was directed to end the dumping of sludge into ocean waters as soon as possible after the date of the enactment of that section, but in no case could the Administrator issue any permit or renewal thereof "which authorizes any dumping after December 31, 1981."

Consistent in scope and effect with the FWPCA are the other provisions of the MPRSA, e.g., the detailed civil

and criminal sanctions for enforcement of the Act, §1415; the interaction between the Administrator and the states and the attendant rights and obligations of the parties thereto, 33 U.S.C. §1416(d); the substantial funding programs established by the act for the purpose of the design and creation of suitable land based alternatives for the disposition of sewage sludge to be available at the time when dumping is no longer permitted; and the mandating of extensive and comprehensive research programs directed toward a further definition of the problems inherent with dumping chemicals or toxicants into ocean waters and the scientific, technological and economic factors which go into the solution thereof.

The legislative format for the regulation and prevention of water pollution as it stands now, compared with that in existence at the time of the aforesaid Court decisions regarding federal preemption in this area, *Illinois* v. *Milwaukee, supra, United States* v. *Ira S. Bushey and Sons, Inc., supra,* and *United States ex rel Scott* v. *United States Steel Corp., supra,* clearly exemplifies that type of federal regulation and control of the pollution of interstate waters called for by those decisions. Having reached the point where the EPA has been given and has effectively assumed the complete authority for the regulation and prevention of water pollution through the promulgation of regulations and the enforcement thereof, there is no longer a need for actions by private citizens injured by violations of the FWPCA or MPRSA, and regulations promulgated thereunder, to be commenced other than through the citizens' suit framework and provisions embodied in those Acts.

The conclusion that federal preemption of federal common law nuisance actions is now at hand is not in any way lessened in effect by the existence of the savings' clauses

contained in the citizens' suit provisions of the Acts. Having come into effect at the time of the enactment of the FWPCA and MPRSA, the savings' clauses insured the availability of alternative remedies outside the provisions of the Acts, including, but not limited to, those available at common law. The decisions noted herein also recognized a need for such common law actions at that time. However, as we have noted, the practical application of the regulatory and enforcement provisions contained in the Acts has attained the stature envisioned at the time of the enactment of the Acts. Thus, it is not inconsistent at this point in time to preclude federal common law nuisance actions as an available remedy under the savings' clause provisions of the Acts; their necessity is outdated and their practical effect at this time would wreck havoc on the strides taken and achieved by the EPA in its successful task of regulating and preventing the pollution of our waters.

CONCLUSION

For the reason stated, Petitioner respectfully prays that the judgment below should be reversed in part consistent with Petitioner's stated position herein on the questions for review as limited by this Court.

Respectfully submitted,

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